Supreme Court, U.S.
FILED
AUG 27 2001
CLERK

No. 01-75

In The

# Supreme Court of the United States

PATRICIA E. GENTALA and ROBERT A. GENTALA,

*Petitioners,*

v.

THE CITY OF TUCSON,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the en banc panel of the court of appeals correctly determined that the Establishment Clause of the First Amendment prohibits the City of Tucson from providing a municipal subsidy from its tax-generated Civic Events Fund and public employees to provide stage, lighting, sound, and other special-event services for a religious organization's sectarian prayer service held in the bandshell of a public park, where such services are not routinely provided to other park users, and where the City requires Civic Events Fund recipients to identify the City as a contributor in all event advertising.

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## JURISDICTION

On July 25, 2001, Chief Deputy Clerk Francis Lorson extended the deadline for filing a response to the petition for a writ of certiorari until August 27, 2001.

## CONSTITUTIONAL PROVISIONS AND ORDINANCES

The text of article II, section 12 and article IX, section 10 of the Arizona Constitution are set forth in Appendix 1. Relevant Tucson code ordinances are set forth in Appendices 2-6.

## STATEMENT OF THE CASE

### Facts

1. Respondent City of Tucson ("City") owns municipal parks that are open and available to the public for a wide range of uses. Pet. 2. Should, however, "civic, social, religious, charitable, commercial or other users" wish to use City equipment, such as display booths, bleachers, or staging, the Tucson Code establishes mandatory fees for such use. T.C. §21-14; App. 2. Similar mandatory fees are required for use of other non-basic City services like bandshells and lighting packages. T.C. §21-16(4); App. 5. The fees set forth in both T.C. §21-14 and §21-16(4) are mandatory and may not be waived. ER, 17-1, ¶7.[1] These

[1] "ER" refers to the Excerpts of Record filed with the court of appeals.

fees apply to all City parks users who wish to use City equipment at their events.

2. To encourage and support a limited number of civic events it believes celebrate the City's heritage, increase knowledge and understanding of issues that improve citizens' quality of life, generate community appeal and participation, contribute to tourism, or are otherwise identified as unique community events,[2] the City administers a discretionary municipal subsidy program through its Civic Events Fund ("Fund"). The Fund consists of public moneys appropriated by the City on an annual basis from its general coffers and is derived from tax revenues and user fees, among other sources. ER, 17-3, at ¶¶4, 6. The Fund is legislatively appropriated on an annual basis solely for subsidizing civic events that the City's Mayor and Council believe meet its Civic Event Policy criteria. The Fund cannot be used for non-civic event purposes, and eligible civic events cannot receive funding once the appropriated Fund monies have been exhausted in a given fiscal year. *Id.* at ¶7.

Contrary to Petitioners' factual recitation, civic event funding is not available to every City park user. Pet. 3. Rather, to be eligible to receive a City subsidy, an event must be classified as a civic event, and meet one of the stated purposes contained in the Civic Event Policy. Pet. App. 162a-166a. A civic event must also meet a number of additional conditions to be eligible for funding. The civic event must (1) be sponsored by a non-profit organization or by individuals conducting the event on a non-profit

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[2] Complete criteria are set forth in the City's Civic Event Policy Statement and Evaluation Criteria, ("Civic Event Policy"). Pet. App. 162a.

basis "with all fund-raising proceeds used for a community benefit;" (2) be open to the public and cannot discriminate against persons in any manner; and (3) maintain liability insurance and a financial accounting of the event, and acquire necessary permits from the City. *Id.* at 163a-164a.[3] Lastly, the City requires all civic events it funds to "acknowledge through event advertising and an announcement at the event that the City has contributed services to the event." Pet. App. 135a-136a.

The Civic Event Policy lists three types of events that are ineligible to receive civic event support:[4]

a. Events sponsored by organizations that receive City funding through the Outside Agency process;

b. Events sponsored by organizations that use City property on a rent-waived ($1/yr) basis; and

c. Events held in direct support of religious organizations.

Pet. App. 163a.

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[3] Petitioners' Complaint alleged that the liability insurance requirement was a prior restraint on speech and that the financial accounting requirements constituted "excessive government entanglement with religion in violation of the Establishment Clause." ER 1 at p. 9.

[4] Although not specifically enumerated in the Civic Events Policy, counsel for the City explained that other events are likewise excluded from receiving civic events funding (e.g., political fundraisers and rallies). Transcript of Hearing on Motion for Preliminary Injunction [Prel. Inj. Tr.] at 36, 38 (D. Ariz. Aug. 8, 1997). Thus, not only is civic event funding not available to all park users, but it is also not available to all nonprofit organizations.

The City does not automatically award grants to all eligible civic events. Rather, once the Subcommittee of the Mayor and Council determines that an event is "eligible" for funding, it applies the "Evaluation Criteria," to determine whether the event is one that the City should support, and in what amount. Pet. App. 162, 165a. These evaluation criteria include: (1) the purpose and objectives of the event; (2) the extent to which the event generates broad community appeal and participation; (3) the event's need for support; and (4) the event's ability to obtain financial support from other public and private sources.

The Subcommittee or the Mayor and Council may choose, and have chosen, not to fund "eligible" events. ER 17-3 at ¶17.[5] Events containing religious subject matter or viewpoint may be, and have been, funded where there is no direct benefit to a particular religious organization. ER 17-3, exhibits 4-6. Thus, Petitioners' contention that the City "categorically denies" civic event funding for "events with a religious message" (Pet. 2) is incorrect. The civic event policy denies City subsidies for events held in direct support of a religious organization. Pet. App. 163a. The policy does not preclude religious speech or expression per se from receiving a subsidy. ER 17-3, exhibits 4-6. Events not raising funds for a religious organization have been granted subsidies despite being

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[5] In fiscal year 1992-93, the Mayor and Council declined to support the Tucson Residence Foundation Greased Pig Contest. ER 7-C at p. 2. In 1995, the City did not fund the Humane Society Fun Day, the Sister Cities Fund Raiser, and the Casa Car Show. ER 7-B, pp. 2-3.

sponsored by a religious organization, because no direct benefit flowed to the organization.[6] In contrast, the City has denied civic event subsidies where the subject matter of the event, such as a carnival or bazaar, may have little or no religious content, but the direct beneficiary of the event was a religious organization.[7]

With the exception of the approximately two dozen civic events granted subsidies by the City each year,[8] all other events, nonprofit or otherwise, desiring to use the bandshell and its lighting and audio system are required to pay fees, as provided in the Tucson Code. ER 17-1 at ¶¶4-7, and Apps. 4-6. In the case of events granted subsidies, the bill for such equipment and services, expenses that would normally be paid by an event sponsor, are instead charged to, and paid by, the Fund. ER 17-3, ¶7. In

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[6] For example, the City has subsidized a fishing clinic for disabled children sponsored by the Aid Association for Lutherans, a Mormon Battalion event celebrating the placement of a monument in a city park which commemorated a Tucson historical event, and a Las Posadas pageant, reenacting the events surrounding the birth of Jesus which was sponsored by the Tucson Festival Society and a local public school. ER 17-3, exhibits 4-6.

[7] In fiscal years 1991-92 and 1992-93, the City declined to support several fundraisers for Christian schools, including the San Xavier Mission School's pageant celebrating "the heritage of the Old Pueblo," the Santa Cruz Church and school's "Fiesta de Familia," the St. John the Evangelist School's annual Fiesta, and the St. Peter & Paul School's "Fun Days." ER 17-3, exhibits 1-3.

[8] The court of appeals found that in 1995, the only year for which there is complete information in the record, 23 of 26 groups received funding. Pet. App. 9a.

all instances, however, the required fees are paid, either by the organization using the equipment and services, or by the City itself.

4. Petitioners, on behalf of the Tucson National Day of Prayer Committee ("Prayer Committee"), applied to the City for civic event support seeking stage, audio, and lighting services at the City's Demeester Outdoor Performance Center at Reid Park, for an event called the National Day of Prayer. Pet. App. 135a. Co-sponsor of the event was the Tucson Association of Evangelicals, a religious organization. *Ibid.*

The Prayer Committee's application described the event as an "annual gathering of Tucson Christians" for praise and worship, with "[p]astors from nine different churches [leading] the participants in prayer for local, state, and national issues . . . ." Pet. App. 141a. The application stated that there would be no admission charge, but acknowledged that a "free will offering" would be conducted at the close of the program, and that "[a]s much as possible," the balance would be "reserved for next year's event." Pet. App. 142a-144a.

After reviewing the application, both the City's Civic Event Subcommittee and the Mayor and Council denied civic event funding for the Prayer Committee's event citing separation of church and state issues, and concluding that the event was one held in "direct support of a religious organization."[9] ER 7-G, 7-I, 7-J.

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[9] The City has always maintained that the Prayer Committee's event is "a religious event, involving religious expression and directly supporting religious groups." Pet. App. 60a.

The Prayer Committee's event was held. Pet. 8. "As planned, and ultimately carried out, the National Day of Prayer Event consisted of a few songs followed by prayer led by nine pastors from different churches [and] was attended by several hundred persons." Petitioners' Complaint, ER 1 at 6.

**Proceedings Below**

5. Following denial of civic event funding, petitioners brought this suit in the United States District Court for the District of Arizona, alleging, *inter alia*, that the City's Civic Event Policy is unconstitutional on its face and as applied in violation of the First Amendment's Free Speech Clause, Establishment Clause, and Free Exercise Clause. Pet. App. 55a.[10]

At the preliminary injunction hearing, petitioners moved to consolidate the hearing with the trial on the merits. Pet. App. 56a. Over the City's objection, the district court granted petitioners' motion to consolidate.[11]

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[10] Petitioners also alleged a violation of the Religious Freedom and Restoration Act of 1993, 42 U.S.C. §§2000bb-1-4; however, based on this Court's decision in *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997) holding the statute unconstitutional, the court did not consider this claim. This issue is not on appeal.

[11] During the course of the proceedings, the City sought to amend its answer to add state law defenses. Article II, §12 of the Arizona Constitution provides in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Article IX, §10 states: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service

Pet. App. 79a. Next, the district court denied petitioners' motions for preliminary and permanent injunctive relief, concluding that the City's actions did not violate petitioners' free speech rights and that funding the Prayer Committee's activities would have violated the Establishment Clause, and dismissed the action. Pet. App. 77a.

6. Both parties appealed the district court's respective adverse rulings. Pet. App. 83a.

a. On appeal, a divided panel of the Ninth Circuit reversed. Pet. App. 80a-109a. While the two-judge majority acknowledged that "the idea of the government subsidizing a public prayer service raises obvious Establishment Clause concerns," (*id.* at 107a) it nevertheless concluded that petitioners' Free Speech rights outweighed this concern. The two-judge majority reasoned that "even if the City's reimbursement of costs for the National Day of Prayer event provided some support for theism over its opposite, or for Christianity over competing world views," the amount of support in this case "was neither substantial nor direct enough" to violate the prohibition on advancement of religion under the Establishment Clause. *Id.* at 98a.

b. Judge Pregerson dissented. Pet. App. 109a-133a. Judge Pregerson found, *inter alia*, that the City was promoting its own message through its Civic Event Policy and thus did not violate petitioners' Free Speech or Free Exercise rights, and that in any event, awarding taxpayer

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corporation." Both provisions are set forth in their entirety in App. 1. The district court denied the City's motion to amend its answer. App. 7.

funds, not generally available to all non-religious organizations, would amount to unconstitutional direct financial support of petitioners' religious organization. *Ibid.*

7. Thereafter the Ninth Circuit granted the City's request for rehearing en banc. Pet. App. 160a.

a. An en banc panel of the court of appeals withdrew the earlier panel decision and affirmed the district court's order. *Gentala v. City of Tucson*, 244 F.3d 1065 (9th Cir. 2001), Pet. App. 1a.

The en banc court applied this Court's decision in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and the Court's post-*Rosenberger* cases to the facts and found that the City through its "Civic Event Fund Policy Statement and Evaluation Criteria" is "affirmatively promoting certain events as city-endorsed and approved." *Id.* at 35a (fn20).

The court of appeals then concluded that the public funding and government endorsement considerations considerably overwhelmed the neutrality consideration, and thus held that the City's Establishment Clause justification for the religious exclusion was valid.[12]

b. Judge Fernandez dissented. Pet. App. 37a-45a. In his opinion, the City's Civic Event Policy violated the Free Exercise Clause of the first amendment. Nonetheless, he explicitly found that the City's policy did not violate Petitioners' Free Speech rights because in his view "the

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[12] Because the court found the City's actions were justified under the Establishment Clause, it did not find it necessary to address whether the City should have been granted leave to add additional affirmative defenses derived from the Arizona Constitution's religion clauses. *Id.* at 37a.

case is not about speech, viewpoints, or speakers." *Id.* at 37a.

c. Judge Wardlaw joined Judge Kleinfeld in a separate dissent. Pet. App. 45a-50a. In their opinion, the record was not sufficiently developed to permit resolution of the First Amendment issues. *Ibid.* Rather than echoing Judge Fernandez's view, however, they posited that if the City's policy were as represented (and found by the majority) then subsidizing petitioners would violate the Establishment Clause:

> The first possibility is that the City is selective, routinely denying the waiver to events or groups it feels do not "celebrate and commemorate the historical, cultural and ethnic heritage of the City" or do not "instill civic pride." If so, the waiver program would not be a public forum at all. Instead, it would be like the grant program in *Finley* – discretionary government funding subject to selective criteria. In that case the city could properly exclude religious organizations from the waiver program, regardless of whether the waivers would violate the Establishment Clause, simply because the religious nature of the events did not promote the city's message of inclusion. And granting a waiver to [petitioners] under these facts would likely violate the Establishment Clause.

*Id.* at 49a.

## REASONS FOR DENYING THE WRIT

The court of appeals correctly applied the longstanding principles firmly established by this Court for

addressing First Amendment cases. There is no conflict with this Court's precedents or the decisions of other circuits. Further review is therefore unwarranted.

## I. THIS COURT'S DECISION IN *GOOD NEWS CLUB* DID NOT INVOLVE ISSUES OF GOVERNMENT FUNDING OR ENDORSEMENT; THEREFORE IT DOES NOT REQUIRE A DIFFERENT RESULT IN THE DECISION BELOW.

Petitioners err in contending (Pet. 18) that Court's recent plurality decision in *Good News Club v. Milford Central School*, 533 U.S. ___, 121 S.Ct. 2093 (2001), "mandates reversal" of the en banc panel's decision. *Good News Club* involved none of the government funding, speech and endorsement issues present here.

In *Good News Club* this Court found that a public school's refusal to permit after-hours meetings on its property by a Christian children's club violated the club's free speech rights, where "the school facilities are being used for a nonschool function and there is no government sponsorship of the Club's activities." *Id.*, 121 S.Ct. at 2100. The Court did not address the Establishment Clause issue, concluding that under the facts presented, the school had no valid Establishment Clause interest. *Ibid.*

In marked contrast, here the City is engaged in a government function through its Mayor and Council's review, selection, and subsidization of certain limited civic events it believes espouse the City's Civic Event Policy. In addition, the City's subsidization of a civic event, coupled with the advertising requirements, reflects City endorsement of the event.

Given these fact differences, the plurality opinion in *Good News Club* affects neither the analysis, nor ultimate holding in the court of appeals' decision below. Therefore, no review by this Court is necessary.[13]

## II. THE DECISION BELOW FOLLOWS THIS COURT'S FIRST AMENDMENT PRECEDENTS.

Petitioners similarly err in contending (Pet. 18) that the decision below conflicts with this Court's prior First Amendment rulings. This Court has never held that the government, when acting in a communicative manner as it is here, may use taxpayer dollars to selectively subsidize religious organizations engaging in religious worship activity.

### A. Free Speech

Petitioners erroneously claim *Widmar v. Vincent*, 454 U.S. 263 (1981), *Rosenberger*, and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), are dispositive in addressing the Free Speech issue. Pet. 18-19. None of those cases involved the issues here of selective government funding in a limited or nonpublic forum. Petitioners ignore the numerous Free Speech cases that are applicable here – those where the government itself is engaged in communicative expression.

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[13] Should the Court disagree, and determine that the issues warrant further review, the City believes its state law defenses are relevant to such an inquiry and should be permitted. *See, Witters v. State Com'n for the Blind*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850. In any event, these issues should not be disposed of without additional briefing and argument.

First, where the government is acting in a communicative manner, as it is here, it does not matter whether the City's policy is considered to discriminate on the basis of content or viewpoint. As this Court recently reiterated in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S.Ct 1043 (2001) even viewpoint discrimination is permissible in such circumstances.

> [v]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, *see Board of Regents of Univ. of Wis. System v. Southworth*, [citation omitted], or instances, like *Rust*, in which the government "used private speakers to transmit information pertaining to its own program." [citing *Rosenberger*]. . . . The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of Univ. of Wis. System v. Southworth, supra*, at 235, 120 S.Ct. 1346.

*Id.*, 121 S.Ct. at 1048.

In a discretionary subsidy program such as the City's, which limits funding eligibility to events that meet certain criteria, the City will necessarily have inquired into the content of the event, religious or not.

Further, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program," *Rust v. Sullivan*, 500 U.S. at 194.

Accordingly, where as here the City "speaks" through its Civic Event Policy, the City can define parameters, including, limiting or prohibiting funding to events held in "direct support of religious organizations," especially given the significant Establishment Clause issues involved. The decision below simply applies these well-established principles.

**B. Free Exercise**

Petitioners mistakenly contend (Pet. 19-20) that the court below applied an inappropriate test in evaluating their facial challenge to the Civic Event Policy. Petitioners are wrong. The test applied by the court was as follows: "in considering a facial challenge to the policy, we study the words themselves and the City's "authoritative constructions" of them through "its own implementation and interpretation" of the policy. Pet. App. at 14a, fn.9, *citing Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131 (1992). To succeed on a facial challenge, petitioners "must establish that *no* set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Further, this Court has instructed that the proper inquiry in analyzing Free Exercise claims is "whether government has placed a substantial burden on the observation of a central belief or practice," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). The court of appeals made this inquiry and concluded that the City's Civic Event Policy does not substantially burden petitioners' Free Exercise rights.

In support of their claim, Petitioners erroneously rely (Pet. 20) on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a case that is both factually and legally distinguishable. *Lukumi* involved regulatory ordinances prohibiting a religious practice and the record indicated that "suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* at 543.

Here, by contrast, the City is not prohibiting petitioners from engaging in any religious practice, nor are they precluded from using stage, audio, lighting or other City equipment for their events. The City is simply saying that if petitioners wish to use City equipment for events that directly support religious organizations, then they must pay the same fees as virtually every other park user. There is no interference with petitioners' Free Exercise rights.

This Court has repeatedly recognized that the "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right," *Rust*, 500 U.S. at 193 (*quoting Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983)). *See also, Rust*, 500 U.S. at 193 ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."); *accord Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980).

The court of appeals made the appropriate inquiry and concluded that the City's Civic Event Policy does not substantially burden petitioners' Free Exercise rights. Pet. App. 36a.

### C. Establishment Clause

In a discretionary subsidy program such as the City's, which awards funding to limited events that meet certain specified criteria, the City will necessarily have to inquire into the content of the event, religious or not. Consequently, petitioners' reliance on neutrality alone, is misplaced. Neutrality is but one factor to review. *See, Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530, 2578-81 (2000). The City is neutral toward religion. It funds religious speech that meets its criteria as long as it does not directly support a religious organization. Neutrality alone, however, is not enough.

As correctly noted by the court of appeals, the prohibition on government funding of religious activities has long been of central importance to this Court's Establishment Clause jurisprudence. Pet. App. at 24a. *Id.* at 21a-23a. Thus, the court of appeals was appropriately concerned here about the direct use of tax dollars to fund a religious organization's religious activity.

Further, this Court has cautioned, that there is a crucial distinction between government speech endorsing religion, which the Establishment Clause prohibits, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995). The distinction, however, disappears when private speech can be mistaken for that of the government. *Id.* at 766. – That is precisely what the court determined here.

Petitioners dismiss the notion that a reasonable observer would mistake the idea that subsidizing their event could appear as endorsement. But, the court of

appeals correctly found, the City's Civic Events Fund "is *meant* to endorse some events as 'Civic Events' worthy of the City's imprimatur." Pet. App. 31a. The limited events that receive civic event funding are required to advertise the event (both ahead of time and at the function) as having received City funding. Even if the City were to stop advertising funded events and include a disclaimer, the appearance of endorsement would still exist because these are limited events that receive funding. As the court below recognized, this raises two different concerns – a funding concern, and the endorsement concern, both of which stand independently of neutrality. Pet. App. at 24a, fn. 16.

## III. THE COURT Of APPEALS CORRECTLY DISTINGUISHED *ROSENBERGER*.

Petitioners chastise the court below for distinguishing the numerous factual differences between this case and *Rosenberger*. Pet. 22-27. However, this Court has instructed that Establishment Clause analyses are determined by the facts of a given case.

> Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances. . . . "

*Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. at 2282 (2000).

Those differences are significant, and when viewed together, mandate the result reached by the court below:

(1) the City's affirmative identification of itself as the sponsor; (2) the Prayer Committee's status as a religious organization; (3) the use of tax dollars to in essence "pay a church's bills" for a religious event; (4) the lack of private independent choice in determining the funding, i.e., the City selectively chooses which events will receive funding; (5) the City's endorsement of certain civic events; and (6) the advertising requirement for civic event funding recipients.

Accordingly, the court of appeals appropriately distinguished *Rosenberger*.

## IV. THE DECISION BELOW IS IN ACCORD WITH DECISIONS FROM OTHER COURTS OF APPEAL.

Petitioners mischaracterize the nature of the services subsidized by the City and then reach back twenty-one years to the decision in *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), in an attempt to create an artificial split in the circuits. *O'Hair* is factually distinguishable. In *O'Hair*, a group of individuals sought to enjoin a celebration of the Mass by Pope John Paul II on the National Mall. *Id.* at 933. The group also sought to enjoin the Interior Department from providing the event with free crowd and traffic control and other services. The D.C. Court upheld the Interior Department's provision because it was merely providing the same services as "were regularly incurred with any large public gathering."[14] *Ibid.* But here, Civic Event equipment and services

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[14] In his concurrence, Judge MacKinnon also noted in addressing the Establishment Clause concerns, that the

are not routinely granted free of charge to all non-religious users.

More relevant to this case was the court's recitation that the Washington Archdiocese would expend in excess of $400,000 to cover "construction of the platform," the expense of "sound equipment, electrical facilities (including supplemental electric current), portable toilets, first aid stations, chairs, and other physical facilities," and that "after the gathering, it will pay for the removal of all the facilities constructed for the event and for the cleanup." *Id.* at 933. Many, if not most, of these are the very types of items petitioners were asking the City to subsidize. It is the very desire for a City subsidy that is the Establishment Clause issue here, one that was not present in *O'Hair*.

Petitioners seek payment of fees for services and equipment not routinely included with park use, for an event required to advertise the City as a sponsor, and at which fundraising activities were to occur. Thus, *O'Hair* does not conflict with the decision below and no further review is warranted.

## V. PETITIONERS' SPECULATIVE FEARS DO NOT WARRANT REVIEW.

Lastly, petitioners speculate about how the decision below creates "a device for evading and nullifying the

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National Park regulations under which the permit was issued included the express condition that "no fee may be collected," or "donations solicited" at the event, conditions not present here. *Id.* at 937.

equal access rights of religious speakers by establishing fees and then waiving them for virtually all but religious users. Pet. 29. Such a view is a twisted and distorted holding of the decision below. It is petitioners' incorrect attempt to characterize the benefit as one available to all, that then allows them to raise such hypothetical fears. The present case does not establish that the City waives fees for virtually all other park users. Further, there is no suggestion in the record that the City had a pernicious reason for enacting its policy. In the unlikely event that such a case were to arise, the Court would have before it a specific, concrete factual record to address petitioners' concerns; however, that is not present here. Petitioners' speculative fears do not warrant further review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 27, 2001

## CONSTITUTION OF THE STATE OF ARIZONA ARTICLE II. DECLARATION OF RIGHTS

### § 12. Liberty of conscience; appropriations for religious purposes prohibited; religious freedom

Section 12. The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

Ariz. Const. art. II, § 12

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## CONSTITUTION OF THE STATE OF ARIZONA ARTICLE IX. PUBLIC DEBT, REVENUE, AND TAXATION

### § 10. Aid of church, private or sectarian school, or public service corporation

Section 10. No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

Ariz. Const. art. IX, § 10

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**Sec. 21-14. Same – Use of equipment.**

*Sec. 21-14(1).* The fees for use of event equipment by civic, social, religious, charitable, commercial or other users, for an initial minimum rental period (specified below) shall be as follows:

| | | |
|---|---|---|
| (1) | *Double display booth unit (2 booths per unit)* | |
| | a. Without electrical | $ 70.00 |
| | b. With standard electrical | 130.00 |
| (2) | *Bleacher* | |
| | a. 5-tier | $230.00 |
| | b. 8 x 15 | 230.00 |
| | c. 10-tier | 360.00 |
| (3) | *Picnic table* | $ 28.00 |
| (4) | *Portable staging* | |
| | a. Small (up to 16' x 16') without electrical | $145.00 |
| | b. Small (up to 16' x 16') with standard electrical | 205.00 |
| | c. Large (over 16' x 16') without electrical | 300.00 |
| | d. Large (over 16' x 16') with standard electrical | 360.00 |
| (5) | *Ticket booth* | |
| | a. Without electrical | $100.00 |
| | b. With standard electrical | 120.00 |
| (6) | *Kennedy Park Puesto (permanent concession booth)* | |
| | a. Small Puesto | $ 60.00 |
| | b. Large Puesto | 120.00 |
| (7) | *Food serving table* | $ 25.00 |
| (8) | *Barbecue pits* | |
| | a. Small | $ 40.00 |
| | b. Large | 90.00 |

(9) *Additional electrical services*

| | |
|---|---|
| a. Standard electrical outlets (per outlet) | $ 4.00 |
| b. Standard area lighting (per light pole) | 20.00 |

Other electrical services as requested will be charged on a one hundred (100) percent cost recovery basis for labor and material.

The above fees shall be for an initial minimum period as follows:

a. Bleachers: one (1) week

b. Barbecue pits: one (1) day

c. All other equipment: three (3) days

If equipment is to be used longer than the initial rental period (above), additional fees will be charged. The additional use fees will be twenty (20) percent of the original fee for each additional similar time period that the equipment is used.

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**Sec. 21-16. Same – Use of certain meeting rooms; reservation fee for ramadas, sport fields, volley ball courts, bandshells, outdoor performance center, Estevan boxing gym, rodeo grounds, and fees for special maintenance.**

*Sec. 21-16(1).* The fee for use of meeting rooms at any city recreation center shall be as follows:

| | |
|---|---|
| Daytime, on weekdays (8:00 a.m. to 6:00 p.m.), per hour | $ 4.50 |
| Evenings, on weekdays (6:00 p.m. to 10:00 p.m.), per hour | 9.50 |

| | |
|---|---|
| Saturdays, Sundays and holidays (8:00 a.m. to 10:00 p.m.), per hour ..... | 9.50 |

*Sec. 21-16(2).* The fees for reservation and use of any ramadas, rodeo grounds and Estevan Boxing Gym shall be as follows:

| | | |
|---|---|---|
| (1) | Ramada ..... | $ 7.00 |
| (2) | Rodeo grounds (daily): | |
| | For-profit, individual and public entities ..... | 400.00 |
| | For nonprofit groups (501(c)(3)) and schools ..... | 200.00 |
| (3) | Estevan Boxing Gym: | |
| | Professionals: | |
| | Monthly ..... | 20.00 |
| | Weekly ..... | 8.00 |
| | Daily ..... | 2.00 |
| | Amateurs ..... | No Charge |

*Sec. 21-16(3).* The following fees shall be charged for use of sports field, volleyball courts and in-line skating rink:

| | | |
|---|---|---|
| (1) | *Organized tournament use:* | |
| | Volleyball courts; daily, per court: | |
| | For-profit, individuals and private entities ..... | $ 70.00 |
| | For nonprofit groups (501(c)(3)) .... | 15.00 |
| | Sports fields, daily, per field: | |
| | For-profit, individuals and private entities ..... | 120.00 |
| | For nonprofit group (501(c)(3)) ..... | 35.00 |
| | In-line skating rink tournament/special event/clinic rate: | |
| | For-profit, individuals and private entities ..... | $ 60.00 |
| | For nonprofit group (501(c)(3)) ..... | 15.00 |

(2) *Other uses.*

| | |
|---|---|
| Volleyball courts: | |
| Day (3 hours) | 7.00 |
| Night (2 hours) | 9.00 |
| Sports fields: | |
| Day (3 hours) | 7.00 |
| Night (2 hours) | 12.00 |
| In-line skating rink | |
| Day (3 hours) (8:00 a.m. – 6:00 p.m.) | 7.00 |
| Night (2 hours) (6:00 p.m. – 8:00 p.m. or 8:00 p.m. – 10:00 p.m.) | 9.00 |

*Sec. 21-16(4).* There shall be a fee for use of a bandshell of seventy-five dollars ($75.00) per day. There shall be a fee for use of the Himmel Park Amphitheater area of ten dollars ($10.00) per day. Bandshells and amphitheaters may be reserved in advance upon payment of the fee. The following fees shall be charged for the hourly use of the Outdoor Performance Center:

| | |
|---|---|
| Stage only, with lights; 2-hour minimum | $20.00 |
| Stage and inside facilities; 2-hour minimum | 30.00 |
| Stage and inside facilities and green room, 2-hour minimum | 40.00 |

*Sec. 21-16(5).* The users of any park facility referred to in this chapter may request special maintenance of any athletic facility referred to in this chapter. The request shall be in writing at least twenty-four (24) hours prior to the requested special maintenance. In writing, the department shall advise the party requesting special maintenance, at the time the request is made, the cost of providing the special maintenance. The cost shall be an

estimate of the actual cost to the city of providing a service, and shall be paid for in advance.

*Sec. 21-16(6).* The rental fee for each concession stand at sports fields shall be sixty dollars ($60.00) per event, not to exceed three (3) days. If the event for which the stand is rented exceeds three (3) days, an additional pro rata fee shall be charged per additional day.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL MINUTES – GENERAL)

Case No. CV 97-327 Date: August 11, 1997

Title: GENTALA vs CITY OF TUCSON

**HONORABLE FRANK R. ZAPATA**

Proceedings: [ ] Open Court
[X] Chambers [ ] Other

Defendant City of Tucson moves to amend its answer to add as a defense certain arguments based on the fact that the "requirements of the Arizona Constitution are stricter than its federal counterpart and may provide for additional grounds for disposal of this case." While it is true that federal courts generally avoid making decisions of Constitutional law where there are other grounds to base a decision, the defense offered by the City does not provide such grounds. A state cannot reduce the rights guaranteed by the Bill of Rights to all citizens, although it may enlarge them in its own constitution and jurisprudence. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (Supreme Court upheld state court decision interpreting the state constitution to protect the distribution of pamphlets and petitions at a privately owned shopping center).

**IT IS ORDERED** that the Defendant, City of Tucson's Motion to Amend Answer is **DENIED.**

/s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Court Judge